

1733.

DENHAM  
v.  
BAILLIE.

ARCHIBALD DENHAM of Westshield, } *Appellant*;  
Esq. Advocate, - - - - - }  
Mr. JAMES BAILLIE, W.S. *Respondent*.

5th June, 1733.

TAILZIE.—ACT 1685, c. 22.—Debt contracted by an heir of entail not infest, but possessing upon a general retour, in which the clauses of the entail against contracting debt were not repeated—found to be not chargeable against the entailed lands. Found likewise that the same debt was not chargeable on the entailed lands, although the entail had not been recorded in terms of the act.

SIR WILLIAM DENHAM of Westshield executed a strict entail of his estate. Upon his death without issue, the succession devolved upon Robert Baillie; and no infestment having followed upon the entail, which was never registered, he was retoured upon a general service as heir of provision to Sir William, without inserting in the retour the conditions, limitations, and irritancies contained in the entail. Upon this personal title he possessed the estate until his death, by the style of Sir Robert Denham. He contracted considerable debts.

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In 1719 the appellant, being the next substitute, brought an action against Sir Robert, (which, upon his death, was continued against his heirs,) to have it found that, the clauses irritant and prohibitory of the entail not having been inserted in the general retour, an irritancy was incurred in terms of the act 1685, c. 22. The Court of Session found that Feb. 1726.

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the irritancy had been incurred ; and in virtue of their decree, the appellant was served heir of entail to Sir William, and entered on possession of the estate.\*

Thereafter, James Baillie, a creditor of Sir Robert Denham, brought an action against the appellant, to have it found and declared “that certain debts  
“ due to him from the said Sir Robert might lawfully  
“ affect the estate of Westshield, for that, when the  
“ debt was contracted the debtor was in possession of  
“ the estate, by a right which enabled him to affect  
“ or convey the same. That though the irritant and  
“ resolute clauses in the entail had been effectual  
“ against the heir of entail, and did limit his right,  
“ yet they could have no effect against his credi-  
“ tors, with respect to whom the case was the same  
“ as if the procuratory of resignation had been ab-  
“ solute, without any clause irritant or resolute,  
“ in regard that the entail being made subsequent  
“ to the act of parliament 1685, it was necessary  
“ that in conformity to the directions of that act  
“ the entail should be recorded, and the clauses  
“ irritant and resolute be inserted in the convey-  
“ ances or titles under which the heirs of entail pos-  
“ sessed, which being omitted, these clauses could  
“ not be effectual against creditors.”

In defence, it was answered, that although a creditor, contracting with an heir of entail infest, who

\* After the decision of the present case in the House of Lords, this judgment was appealed from, and reversed. February 17, 1737. *Vide infra.*

has omitted to insert in his infeftment the irritant and resolute clauses, may be secure, because he contracts *bona fide* on the faith of the record where the infeftment is registered; yet the case is different where a creditor, as in this case, contracts with an heir of entail, who has only a personal latent right, limited by irritant and resolute clauses; he does not contract on the faith of any record, and he ought to have examined the personal right, which not appearing on any record, and being *ipso jure* qualified by the conditions contained in it, must necessarily be effectual against any person who contracts upon the footing of it. The purview of the statute concerning entails is to regulate such only as being made real by infeftment, become a fund of credit, on which creditors or purchasers may rely.

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The cause being reported by the Lord Ordinary, the Court found “that the said estate is still affect-  
“able by the pursuer, as creditor to the said Robert  
“Baillie,” (Sir Robert Denham.)

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This judgment was adhered to.

The appeal was brought from the interlocutors of the 23d and 27th Nov. 1731, and the 22d Nov. and 15th Dec. 1732.

Entered  
January 23,  
1733.

*Pleaded for the Appellant* :—He who has only a personal right, on which no infeftment has followed, limited by express conditions not to charge the estate with debt, cannot, in breach of those conditions, and beyond the powers given him by the title under which alone he possesses, burden the lands with debt.

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Although the contracting debt is a breach of the entail, and is a just ground for irritating the contractor's right, it does not thence follow that the debt must be a charge on the estate. This is the case of every irritancy incurred by contracting debt; the heir forfeits his right, but the debts are nevertheless void, and will not affect either the estate, or the substitute to whom upon the forfeiture it descends.

As the respondent has contracted, not with an heir of entail infest, whose right might appear absolute, nor upon the faith of any record, but only upon the footing of a personal right, expressly qualified with a prohibition to contract debt, he must be affected with the qualities attending that right.

But the act 1685 gives security to those creditors only who have *bona fide* contracted with persons who are infest, and whose infestments are recorded without any limitation, whereby creditors contracting on the faith of the record, may be induced to believe that the right is simple and absolute. Those again who transact on the faith of a personal right only have no security from the act, and ought to have none, because it is impossible to suppose that they would transact without seeing the personal title of him whom they trust; and therefore they cannot be ignorant of the prohibitions by which he is disabled from contracting debt.

*Pleaded for the Respondent*:—At the time of contracting this debt, Sir Robert Denham was legally possessed of, and entitled to the estate, in virtue of the original disposition, and his general ser-

vice as heir of provision to Sir William Denham; and as that service established in Sir Robert a good right to the lands, and there were no restrictions either expressed or referred to in the retour of that service, and no publication of the prohibitory irritant, and resolute clauses contained in the disposition, it must reasonably be supposed that whoever transacted with Sir Robert must have transacted on the faith that the lands then in his possession were chargeable with his debts.

The respondent is a *bona fide* creditor, and cannot be held to have known the conditions of Sir Robert Denham's right to the lands; the deed of entail not having been registered in the proper office, nor the disabling clauses inserted in the retour, which was the only right in virtue of which he possessed.

The register of entails was intended to prevent just creditors being deceived by heirs of entail, as it made them secure if they searched it before contracting; but the act cannot be construed to mean that just creditors should suffer by the default of an heir (legally possessed of the lands at the time) not complying with the directions of the act; nor in any case, except where they unwarily transact with an heir of entail who has observed punctually those directions.

Personal tailzies, as well as real, are regulated by the act of parliament, upon which principle alone the appellant prevailed in his action against the heirs of Sir Robert Denham; and it would be most unequitable to hold that creditors are barred by the same law from recovering their just debts,

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merely on the ground that it related to real and not to personal estates. The act has declared that no entail shall be real and effectual against creditors unless the original deed is registered in the proper office, and the conditions and limitations repeated in the rights and conveyances by which the heirs of entail possess the lands; and as Sir Robert neither registered the entail, nor repeated the limitations in the retour of his service, it is clear that his creditors can affect the lands with his debt, notwithstanding the clauses in the deed, in consequence whereof they descended to the appellant.

Judgment  
June 5, 1733.

After hearing counsel, “it is ordered and adjudged, &c. that the said interlocutor of the 23d November 1731, whereby the Lords of Session found ‘that the estate of Westshield is still affectable by the pursuer as creditor to the deceased Robert Baillie *alias* Denham,’ as also the said subsequent interlocutors complained of in the said appeal, be, and the same are hereby reversed.”

For the Appellant, *Dun. Forbes, C. Talbot, Ro. Dundas.*

For the Respondent, *P. Yorke, Ch. Areskine, A. Hume Campbell.*